

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CLIFFORD MCCLAIN,

Case No. 2:17-cv-00753-RFB-NJK

Petitioner,

## ORDER

v.

BRIAN WILLIAMS, et al.,

## Respondents.

14 Petitioner Clifford McClain has submitted a *pro se* petition for writ of habeas corpus  
15 pursuant to 28 U.S.C. § 2254 and has paid the filing fee (ECF Nos. 1, 3). Accordingly,  
16 his application to proceed *in forma pauperis* (ECF No. 4) shall be denied as moot. The  
17 court had directed McClain to show cause and file proof to demonstrate that this petition  
18 was timely filed (ECF No. 7). However, McClain has filed an amended petition, that  
19 appears to indicate that this federal petition is timely (ECF No. 5). Accordingly, the court's  
20 order dated October 18, 2017 shall be vacated.

21 The court has reviewed the amended petition pursuant to Habeas Rule 4, and it  
22 shall be docketed and served on respondents.

23 A petition for federal habeas corpus should include all claims for relief of which  
24 petitioner is aware. If petitioner fails to include such a claim in his petition, he may be  
25 forever barred from seeking federal habeas relief upon that claim. See 28 U.S.C.  
26 §2254(b) (successive petitions). If petitioner is aware of any claim not included in his  
27 petition, he should notify the court of that as soon as possible, perhaps by means of a  
28 motion to amend his petition to add the claim.

1 Petitioner has also submitted a motion for appointment of counsel (ECF No. 6).  
2 There is no constitutional right to appointed counsel for a federal habeas corpus  
3 proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999  
4 F.2d 425, 428 (9th Cir.1993). The decision to appoint counsel is generally discretionary.  
5 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986), cert. denied, 481 U.S. 1023 (1987);  
6 *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984).  
7 However, counsel must be appointed if the complexities of the case are such that denial  
8 of counsel would amount to a denial of due process, and where the petitioner is a person  
9 of such limited education as to be incapable of fairly presenting his claims. See *Chaney*,  
10 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970). Here,  
11 McClain's petition appears sufficiently clear in presenting the issues that he wishes to  
12 raise, and the legal issues are not particularly complex. Therefore, counsel is not justified.

13 **IT IS THEREFORE ORDERED** that this court's show-cause order dated October  
14 18, 2017 (ECF No. 7) is **VACATED**.

15 **IT IS FURTHER ORDERED** that the application to proceed *in forma pauperis* (ECF  
16 No. 4) is **DENIED** as moot.

17 **IT IS FURTHER ORDERED** that the Clerk **shall ELECTRONICALLY SERVE** the  
18 amended petition (ECF No. 5) on the respondents.

19 **IT IS FURTHER ORDERED** that the Clerk shall add Adam Paul Laxalt, Nevada  
20 Attorney General, as counsel for respondents.

21 **IT IS FURTHER ORDERED** that respondents shall file a response to the amended  
22 petition, including potentially by motion to dismiss, within **ninety (90) days** of service of  
23 the petition, with any requests for relief by petitioner by motion otherwise being subject to  
24 the normal briefing schedule under the local rules. Any response filed shall comply with  
25 the remaining provisions below, which are entered pursuant to Habeas Rule 5.

26 **IT IS FURTHER ORDERED** that any procedural defenses raised by respondents  
27 in this case shall be raised together in a single consolidated motion to dismiss. In other  
28 words, the Court does not wish to address any procedural defenses raised herein either

1       in *seriatum* fashion in multiple successive motions to dismiss or embedded in the answer.  
2       Procedural defenses omitted from such motion to dismiss will be subject to potential  
3       waiver. Respondents shall not file a response in this case that consolidates their  
4       procedural defenses, if any, with their response on the merits, except pursuant to 28  
5       U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents  
6       do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they shall do so within  
7       the single motion to dismiss and not in the answer; and (b) they shall specifically direct  
8       their argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v.*  
9       *Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses, including  
10       exhaustion, shall be included with the merits in an answer. All procedural defenses,  
11       including exhaustion, instead must be raised by motion to dismiss.

12       **IT IS FURTHER ORDERED** that, in any answer filed on the merits, respondents  
13       shall specifically cite to and address the applicable state court written decision and state  
14       court record materials, if any, regarding each claim within the response as to that claim.

15       **IT IS FURTHER ORDERED** that petitioner shall have **forty-five (45) days** from  
16       service of the answer, motion to dismiss, or other response to file a reply or opposition,  
17       with any other requests for relief by respondents by motion otherwise being subject to the  
18       normal briefing schedule under the local rules.

19       **IT IS FURTHER ORDERED** that any additional state court record exhibits filed  
20       herein by either petitioner or respondents shall be filed with a separate index of exhibits  
21       identifying the exhibits by number. The CM/ECF attachments that are filed further shall  
22       be identified by the number of the exhibit in the attachment.

23       **IT IS FURTHER ORDERED** that the parties SHALL SEND courtesy copies of all  
24       exhibits in this case to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, directed  
25       to the attention of “Staff Attorney” on the outside of the mailing address label. Additionally,  
26       in the future, all parties shall provide courtesy copies of any additional exhibits submitted  
27       to the court in this case, in the manner described above.

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1           **IT IS FURTHER ORDERED** that the motion for appointment of counsel (ECF No.  
2 6) is **DENIED**.

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4           DATED: 2 November 2017.



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RICHARD F. BOULWARE, II  
7           UNITED STATES DISTRICT JUDGE

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